Nos. 88-192 and 88-325

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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MCKESSON CORPORATION,

*Petitioner,*

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Florida**

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AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

*Petitioners,*

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of Arkansas**

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## BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION; JOINED BY THE MULTISTATE TAX COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

*Amici* will address the following question:

Whether *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), states the appropriate test for determining the availability of a tax refund as a remedy for a violation of the Commerce Clause.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTEREST OF THE *AMICI CURIAE* | 2 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 6 |
| THE *CHEVRON* TEST SHOULD NOT CONTROL THE AVAILABILITY OF REFUNDS IN THESE CASES | 6 |
| A. The Constitution Does Not Require The Payment Of Tax Refunds When A State Tax Statute Is Struck Down As Unconstitutional | 6 |
| B. State Courts Are Not Obligated To Use The *Chevron* Test To Determine The Availability Of Tax Refunds | 10 |
| 1. *The* Chevron *test fails to take into account the special nature of the government defendant* | 12 |
| 2. *The availability of a refund is a question of remedy that should be settled by state courts as a matter of state law* | 16 |
| CONCLUSION | 26 |

## TABLE OF AUTHORITIES

CASES: Page

*Allegheny Pittsburgh Coal Co. v. Commission*, No. 87-1303 (Jan. 18, 1989) ..... 8
*Allen v. Hardy*, 478 U.S. 255 (1986) ..... 11
*Allen v. State Board of Elections*, 393 U.S. 544 (1969) ..... 7, 11
*American Trucking Ass'ns, Inc. v. Conway*, 508 A.2d 408 (Vt. 1986), *cert. denied*, 107 S.Ct. 3262 (1987) ..... 10
*American Trucking Ass'ns, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987) ..... 9, 12, 15, 24
*Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) ..... 7, 11, 15, 19
*Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) ..... 24
*Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *app. dismissed*, 107 S.Ct. 1949 (1987) .... 17, 21
*Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) ..... 10
*Atchison, T. & S.F.R.R. v. O'Connor*, 223 U.S. 280 (1912) ..... 7
*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) ..... 9, 17, 18
*Best & Co. v. Maxwell*, 311 U.S. 454 (1940) ..... 7
*Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) ..... 22
*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) ..... 24
*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 6
*Burlington Northern R.R. Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988) ..... 20
*Caban v. Mohammed*, 441 U.S. 380 (1979) ..... 6
*Califano v. Westcott*, 443 U.S. 76 (1979) ..... 24
*Carpenter v. Shaw*, 280 U.S. 363 (1930) ..... 7, 8, 9
*Chapman v. California*, 386 U.S. 18 (1967) ..... 18-19
*Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979) ..... 23
*Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) .... *passim*
*Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) ..... 11



## TABLE OF AUTHORITIES—Continued

Page

*Cipriano v. City of Houma*, 395 U.S. 701 (1969) .. 6, 11
*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) ..... 5, 13, 16
*City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) ..... 6
*Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) ..... 18
*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) ..... 24
*Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939) ..... 23
*Connor v. Williams*, 404 U.S. 549 (1972) ..... 6
*Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) ..... 22, 23
*Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883) ..... 9
*Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) ..... 7
*Edelman v. Jordan*, 415 U.S. 651 (1974) ..... 10
*England v. State Board of Medical Examiners*, 375 U.S. 411 (1964) ..... 11
*Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) .... 9, 18, 25
*Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) ..... 18
*First of McAlester v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985) ..... 21
*Florida v. Long*, 108 S.Ct. 2354 (1988) ..... 7, 11, 15, 19
*Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945) ..... 10
*Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863) ..... 17
*General Oil Co. v. Crain*, 209 U.S. 211 (1908) ..... 9
*Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987) ..... 11
*Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944) ..... 10
*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) ..... 4, 6, 17, 18

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Griffith v. Kentucky*, 479 U.S. 314 (1987) | 11, 12 |
| *Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968) | 11 |
| *Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294 (1865) | 17 |
| *Heckler v. Mathews*, 465 U.S. 728 (1984) | 24, 25 |
| *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) | 17, 25 |
| *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911) | 8, 9 |
| *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) | 22 |
| *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) | 19-20 |
| *Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) | 20 |
| *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931) | 7, 8 |
| *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946) | 10 |
| *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978) | 20 |
| *Lemon v. Kurtzman*, 411 U.S. 192 (1973) | 4, 6, 14, 19 |
| *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) | 21, 24 |
| *Linkletter v. Walker*, 381 U.S. 618 (1965) | 6, 11 |
| *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) | 7, 11 |
| *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) | 24 |
| *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952) | 7 |
| *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985) | 21 |
| *Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tenn. 1986) | 20 |
| *Moore v. Sims*, 442 U.S. 415 (1979) | 20 |
| *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928) | 7 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S.Ct. 2030 (1988) | 17, 21, 23 |
| *Nippert v. City of Richmond*, 327 U.S. 416 (1946) | 21, 24 |
| *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985) | 21 |
| *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) | 6, 11 |
| *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) | 8 |
| *Owen v. City of Independence*, 445 U.S. 622 (1980) | 13, 15, 16 |
| *Palmer v. Ohio*, 248 U.S. 32 (1918) | 8, 9 |
| *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292 (1986) | 11 |
| *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) | 10 |
| *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. 1519 (1987) | 20 |
| *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) | 24 |
| *Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) | 23 |
| *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) | 21 |
| *Quern v. Jordan*, 440 U.S. 332 (1979) | 13 |
| *Saint Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987) | 7, 11 |
| *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983) | 17, 21 |
| *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) | 14 |
| *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) | 7 |
| *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) | 21, 22 |
| *Tyler Pipe Industries v. Washington Dept. of Revenue*, 107 S.Ct. 2810 (1987) | 9, 18, 24 |
| *United States v. Johnson*, 457 U.S. 537 (1982) | 6, 12 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Tax Comm'n*, 645 F.2d 4 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981) | 9 |
| *United States v. Yazell*, 382 U.S. 341 (1966) | 18 |
| *Ward v. Love County*, 253 U.S. 17 (1920) | 7, 8, 9 |
| *West Virginia v. United States*, 107 S.Ct. 702 (1987) | 18 |
| *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981) | 21 |
| *Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984) | 20 |
| *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987) | 23 |
| *Will v. Michigan State Police*, No. 87-1269 | 13 |
| *Williams v. Vermont*, 472 U.S. 14 (1985) | 18, 25 |
| *Zobel v. Williams*, 457 U.S. 55 (1982) | 17, 25 |
| CONSTITUTIONAL PROVISIONS: | |
| Commerce Clause, U.S. Const., Art. I, § 8, cl. 3 | *passim* |
| Due Process Clause, U.S. Const. Amend. V | 24 |
| Equal Protection Clause, U.S. Const. Amend. XIV | *passim* |
| Supremacy Clause, U.S. Const., Art. VI, cl. 2 | 4, 9, 18, 23, 25 |
| U.S. Const. Amend. XI | 10 |
| STATUTES: | |
| 42 U.S.C. § 1983 | 13, 23 |
| BOOKS & TREATISES: | |
| Academy for State and Local Government, *Where Will the Money Come From: Finding Reliable Revenue for State and Local Governments in a Changing Economy* (1986) | 15 |
| J. Choper, *Judicial Review in the National Political Process* (1980) | 22-23 |
| Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940) | 22 |
| J. Story, *The Constitution* | 22 |


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## INTEREST OF THE *AMICI CURIAE*

*Amici* National Conference of State Legislatures, National League of Cities, National Governors' Association, U.S. Conference of Mayors, National Association of Counties, and International City Management Association are organizations whose members include state, county, and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact. The Compact has been entered into by eighteen States and the District of Columbia as full members; ten additional States have joined the Commission as associate members.[1] The Commission has a vital and continuing interest in state tax disputes that may dramatically affect the administration of state tax systems.

These cases concern the effect of the invalidation of state tax statutes under the Commerce Clause. In both cases, petitioners brought suits in state court challenging the constitutionality of the taxes; in both cases the state supreme court ultimately held that the taxes discriminated against out-of-state taxpayers in violation of the Commerce Clause. In both cases the petitioners then demanded full refunds of the taxes collected during the period that the unconstitutional taxing schemes were in effect—claims that in each case ran into the hundreds of millions of dollars. These demands were rejected by both courts below.

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[1] The current full members are Alaska, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee. This brief should not be read to reflect the views of any member State that files a separate brief in this case.



*Amici* and their members have a profound practical interest in the refund rules that the Court will address in these cases. States and local governments draw much of their revenue from the taxation of entities that are engaged in interstate commerce. Yet, as the Court has repeatedly noted, its Commerce Clause jurisprudence is at times confusing and unpredictable; that problem is compounded by the changing nature of many state economies, which poses novel problems for state and local taxing authorities. These factors make it inevitable that taxing schemes occasionally will be found to run afoul of the Commerce Clause. If refunds for these violations are too readily available, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds.

Because *amici* have special expertise in tax litigation in state courts, and because they will be directly affected by the Court's decision here, they submit this brief to assist the Court in the resolution of these cases.[2]

## INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners in both of these cases assume that the availability of a refund is controlled by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and they accordingly devote virtually all of their arguments to a simple application of the three *Chevron* factors. But in doing so, petitioners skip over a more fundamental question: whether *Chevron* applies at all in cases against state governments brought in state courts pursuant to state causes of action. Questions of remedy and retroactivity that arise in lawsuits based on state law are, after all,

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[2] The parties have consented to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Their letters of consent have been filed with the Clerk of the Court.

typically resolved by state courts according to their own rules. So far as retroactivity is concerned, "the choice for any state may be determined by the juristic philosophy of the judges of her courts" (*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 (1932)), and this Court generally has left it to state courts to formulate remedies for state violations of the federal Constitution's Equal Protection and Supremacy Clauses. Against this background, petitioners plainly must shoulder the burden of establishing that use of a federal retroactivity test imposed by this Court—and the *Chevron* test in particular—is somehow compelled by federal law.

1. In our view, petitioners have not carried either part of their burden. They have failed even to attempt to demonstrate the propriety of using the *Chevron* test in these cases. Certainly, nothing in *Chevron* itself—a case involving a federal court dispute between private parties over the meaning of federal maritime law—suggests that its standard should control in suits against state governments brought in state courts. In fact, there are compelling reasons to make retroactivity the exception in such cases. "'[O]ne of the first principles of constitutional adjudication'" is "'the basic presumption of the constitutional validity of a duly enacted state or federal law'" (*Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (plurality opinion) (citation omitted)); holding States retroactively liable when their taxing officials relied on such laws in good faith "could seriously undermine the initiative of state legislative and executive officials alike." *Id.* at 207-208.

Beyond that, the imposition of retroactive liability on state and local governments may—and in these cases would—place dramatic and unexpected burdens not on wrongdoers, as in cases where such liability is imposed for violations of law by private parties, but on the "blameless and unknowing taxpayers" who ultimately



would have to foot the bill. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Of course, we recognize the force of petitioners' argument that persons injured by a State's violation of the Constitution should be made whole. But this consideration bears little weight when the violation involves the Commerce Clause, which does not create rights that are personal to the injured party.

2. More fundamental than the defects in the standard they offer is petitioners' failure to provide constitutional considerations justifying the creation of *any* federal refund rule by this Court for use in state proceedings. A federal rule of retroactivity is not necessary to deter constitutional violations; state courts can be trusted to apply their normal refund rules in a nondiscriminatory manner in adjudicating Commerce Clause claims, and to provide relief when state legislatures attempt to evade the requirements of the Clause.

At the same time, petitioners have no constitutional right to be "made whole" for the States' violations of the Commerce Clause. The Clause does not give petitioners an absolute entitlement to operate in interstate commerce without restriction; instead, it allocates power over commerce between the federal and state governments. The benefits that petitioners derive from the national free trade area that prevails in the absence of congressional action is incidental. The Clause thus was not designed to protect personal rights. And because the Clause does not secure any personal right of petitioners, it is a matter of indifference to the Constitution whether, once barriers to commerce are removed, a refund also is made available.

In any event, even if the Commerce Clause is understood to create rights that are in some sense personal to petitioners, it entitles them to no more than nondiscrimination. As in the equal protection area, a viola-

tion of this right may be cured by a mandate of future equal treatment; that mandate need not be extended into the past.

## ARGUMENT

### THE *CHEVRON* TEST SHOULD NOT CONTROL THE AVAILABILITY OF REFUNDS IN THESE CASES

#### A. The Constitution Does Not Require The Payment Of Tax Refunds When A State Tax Statute Is Struck Down As Unconstitutional

1. At the outset, it is clear that the Constitution does not, as a general rule, require the use of remedies for constitutional violations that will set aside completed transactions or disturb settled patterns of conduct. "'[T]he federal Constitution has no voice upon the subject' of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982), quoting *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)), and the Court's holdings in recent years accordingly "have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set "principle of absolute retroactive invalidity."'" *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1973) (*Lemon II*) (citations omitted). *See Linkletter v. Walker*, 381 U.S. 618, 624 (1965).

The Court has applied this understanding in a variety of settings, declining to give retroactive effect to rulings involving a number of constitutional provisions. *See, e.g.*, *Lemon II* (First Amendment); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Article III); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (separation of powers); *Connor v. Williams*, 404 U.S. 549, 550-551 (1972) (Equal Protection Clause); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213-214 (1970) (same); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (same). *See also Caban v. Mohammed*, 441 U.S. 380, 416 (1979) (Stevens, J., dissenting). The



Court has similarly declined to disturb completed transactions or to require full retroactive effect when implementing decisions that involve important federal statutory guarantees, such as the Voting Rights Act (*see Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969)); Title VII of the Civil Rights Act of 1964 (*see Florida v. Long*, 108 S. Ct. 2354 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722-723 (1978)); and 42 U.S.C. § 1981 (*see Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987)).

2. Citing two *Lochner*-era decisions—*Carpenter v. Shaw*, 280 U.S. 363 (1930) and *Ward v. Love County*, 253 U.S. 17 (1920)—the American Trucking Association (ATA) petitioners nevertheless suggest (Br. 28) that the Constitution, of its own force, mandates the payment of refunds when state taxes are collected under a scheme that subsequently is found to be unconstitutional.[3] The

[3] Petitioner McKesson argues (Br. 24-27) that this Court's holdings mandate the payment of refunds as a remedy for unconstitutional taxes. With the arguable exceptions of *Carpenter* and *Ward*, however, none of the cited cases even remotely supports such a proposition. Several simply invalidated state taxes under the Commerce or other Clauses. *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). Others held that a taxpayer whose property is overassessed in violation of the Equal Protection Clause may seek reduction of its assessment as a remedy, and cannot be obligated to seek relief in the form of a higher assessment for other taxpayers (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)), or that a State may remedy an equal protection violation by raising taxes on the favored class (*Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928)). *Atchison, T. & S.F. R.R. v. O'Connor*, 223 U.S. 280, 287 (1912), was a refund action brought in federal court; the Court noted that the State permitted actions for taxes mistakenly paid and "presume[d] that a judgment [of unconstitutionality] in the present action would satisfy the [state] law." And *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), can best be read as standing only for the proposition that "a taxpayer who has been

relatively short shrift that petitioners devote to what should be a dispositive argument, however, suggests that they have some doubt about the continuing vitality of these decisions. That doubt is well-placed.

Even at the time they were decided, there was room to question what the Court actually held in *Carpenter* and *Ward*. Language in decisions rendered immediately prior to *Ward* suggested that state sovereign immunity could be asserted to preclude federal constitutional claims in state court. *See, e.g., Palmer v. Ohio*, 248 U.S. 32, 34 (1918) ("The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States"); *Hopkins v. Clemson Agricultural College*, 221 U.S 636, 642 (1911) (addressing a Fourteenth Amendment claim brought in state court, Court observed that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever"). Indeed, in *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929), decided nine years after *Ward* and one year before *Carpenter*, the Court enjoined the collection of a Louisiana tax asserted to violate the Equal Protection Clause because state law would not allow for a refund if the tax ultimately were held to be unconstitutional, even where the taxpayer paid "under both protest and compulsion" (*id.* at 815); the Court's conclusion that this absence of a state remedy posed the risk of irreparable injury to the taxpayer (*ibid.*) certainly suggested that the Constitution would not of its own force mandate payment of a refund.

The years since *Carpenter* and *Ward* were decided have been no kinder to the decisions. Except in *Carpenter* itself

subjected to discriminatory taxation through the favoring of others" cannot, as his only remedy, "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." That is the proposition for which *Iowa-Des Moines* has since been cited. *See Allegheny Pittsburgh Coal Co. v. Commission*, No. 87-1303 (Jan. 18, 1989), slip op. 9-10.



(which relied on *Ward*), this Court has never cited either decision for the proposition that States must make refunds available for taxes exacted in violation of the Constitution.[4] To the contrary, the Court in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), expressly left it to a state court to determine the availability of a refund remedy after a state tax statute was invalidated under the Supremacy Clause (*id.* at 196-197)—precisely the constitutional violation at issue in *Carpenter*. Indeed, in recent years the Court has repeatedly declined to order refunds in cases striking down state taxing statutes under the Commerce Clause. Instead, the Court has remanded the cases to the state courts for a determination of the availability of refunds—a course the Court followed in both *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-277 (1984), the decisions upon which the separate petitioners here relied in bringing their Commerce Clause challenges. *See also Tyler Pipe Industries v. Washington Dept. of Revenue*, 107 S. Ct. 2810, 2822 (1987). Such remands would hardly have been necessary had the Constitution of its own force required the payment of refunds.[5]

[4] ATA petitioners note (Br. 28) that *Carpenter* and *Ward* were cited several years ago by the Fifth Circuit (*United States v. Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981)). That decision, however, involved an action against the State by the United States, which is not subject to the defense of state sovereign immunity.

[5] In fact, giving *Carpenter* and *Ward* the reading contended for by petitioners would be inconsistent with the modern understanding of state sovereign immunity. It is true that some cases, such as *Carpenter*, *Ward*, and *General Oil Co. v. Crain*, 209 U.S. 211 (1908), may be read to support the proposition that state sovereign immunity cannot be asserted in state court as a bar to a claim grounded on the federal Constitution. The cases we cite above, however, point in the other direction. *See Palmer*, 248 U.S. at 34; *Hopkins*, 221 U.S. at 642. *See also Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883). And the Court's more recent decisions

### B. State Courts Are Not Obligated To Use The *Chevron* Test To Determine The Availability Of Tax Refunds

The conclusion that the Constitution does not compel a refund is not the end of these cases, of course; it leaves the question how to decide whether refunds are available. The petitioners in both of these cases, however, offer an assumption in place of an answer to this question: they ground virtually their entire arguments on the bald assertion that the retroactivity test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), governs the availability of a refund when a state tax is invalidated as unconstitutional. They accordingly devote the vast bulk of their briefs to an analysis of the three *Chevron* factors. But in undertaking this inquiry, petitioners skip over a more fundamental question—whether *Chevron* applies at all to suits in state court that, like the ones in these cases, involve state causes of action. The ATA petitioners assume without discussion that *Chevron* controls the outcome; petitioner McKesson simply asserts (Br. 31) that *Chevron* must be applied in cases involving the federal Constitution, even when those cases are brought in state court pursuant to state refund statutes.

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under the Eleventh Amendment support the latter view. The Court has made it clear that the Amendment bars federal courts from entertaining actions against States seeking refunds for the unconstitutional collection of taxes. *See Edelman v. Jordan*, 415 U.S. 651, 668-669 (1974); *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). "[T]he significance of this Amendment," the Court has added, "'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)). *See Pennhurst*, 465 U.S. at 98-99. By ratifying the Constitution, the States thus did not consent to the assertion against them of constitutional claims in federal court; it is unclear why, by the same ratification, they should be deemed to have waived the fundamental protection of sovereign immunity in their own courts. *See generally American Trucking Ass'ns, Inc. v. Conway*, 508 A.2d 408 (Vt. 1986), *cert. denied*, 107 S. Ct. 3262 (1987).



There is no reason, however, why this should be so. *Chevron* itself involved a nonconstitutional federal claim that had been brought in federal court. *See* 404 U.S. at 98-100. The decisions relied upon by the *Chevron* Court in formulating its retroactivity standard likewise all involved federal causes of action litigated in federal court,[6] as have the civil cases in which the Court has applied *Chevron* since 1971.[7] On its face, then, the *Chevron* test is most naturally read as stating a rule of federal common law that governs the remedies awarded by the federal courts in federal lawsuits. Petitioners do not explain why the *Chevron* standard should be extended beyond that category of cases.[8]

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[6] *See Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*, 392 U.S. 481 (1968) (federal antitrust action); *Linkletter v. Walker*, 381 U.S. 618 (1965) (federal habeas corpus); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (federal action under Equal Protection Clause); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (action under Voting Rights Act); *England v. State Board of Medical Examiners*, 375 U.S. 411 (1964) (federal abstention rules); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (federal res judicata rules).

[7] *See Saint Francis College*, 107 S. Ct. at 2025; *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987); *Northern Pipeline*, 458 U.S. at 87-88. *See also Long*, 108 S. Ct. at 2359; *Norris*, 463 U.S. at 1105-1107; *Manhart*, 435 U.S. at 722-723. *Cf. Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1306 (1986) (Powell, J., dissenting).

[8] The Court has departed from *Chevron* in the criminal area, holding that a new constitutional rule should be applied to all cases pending on direct review—but not, evidently, to cases in which final judgment already had been entered—at the time the rule was adopted. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *compare Allen v. Hardy*, 478 U.S. 255 (1986). In adopting this approach, the Court has pointed to considerations derived from Article III of the Constitution, reasoning that, once a new rule of criminal procedure is announced, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review"; "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith*, 479 U.S.

In fact, in our view there are compelling reasons for this Court *not* to mandate use of the *Chevron* test by state courts in circumstances like those presented here—where the plaintiffs are seeking remedies from state governments pursuant to state refund procedures for violations of the Commerce Clause. If the Court believes that a federal rule governing remedy is necessary in such cases, proper solicitude for the character of state governments and an appreciation of the nature of the Commerce Clause suggest that a refund should be mandated—as a matter of federal law—only when the unconstitutionality of the taxing statute is plain. But we believe that there is no need for this Court to impose its own rule of retroactivity; as in other settings, questions of remedy are best left to the state courts to resolve as a matter of state law. We address these points in turn.

**1. *The* Chevron *test fails to take into account the special nature of the government defendant.***

Despite the amount of space they devote to the *Chevron* test, the ATA petitioners recognize (Br. 12-13) that another standard may be appropriate to govern the availability of tax refunds, although the test they offer would establish a rule of absolute retroactivity when a governmental entity is held to have violated the Commerce Clause. While petitioners are correct in suggesting that

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at 323. *See United States v. Johnson*, 457 U.S. 537, 546-548, 555 (1982). These considerations plainly do not mandate the award of refunds here. Both sets of petitioners obtained the benefit of the Commerce Clause rules for which they contended: the unconstitutional taxes were invalidated. Indeed, the Arkansas Supreme Court in *ATA* gave petitioners the benefit of a new constitutional rule announced in *Scheiner*, a decision rendered while *ATA* was pending on direct review. *Griffith* plainly does not speak to the further question of remedy in Commerce Clause litigation such as that involved here. In any event, it hardly need be added that the federal interest in freeing persons who were incarcerated in violation of the Constitution is very different from the considerations determining the availability of a refund remedy in a civil lawsuit.



a departure from *Chevron* is appropriate, we believe that their proposed standard draws precisely the wrong lesson from this Court's decisions.

The ATA petitioners base their alternative standard on *Owen v. City of Independence*, 445 U.S. 622 (1980), which they read to support the proposition that governmental entities always should be required to make full recompense for constitutional injuries. But *Owen* is inapposite here. There, the Court held only that a municipality could not assert good faith immunity as a bar to suit under 42 U.S.C. § 1983. The question in *Owen* was "essentially one of statutory construction" (445 U.S. at 635), and was resolved by looking to the history and purposes of Section 1983 (*see id.* at 635-636, 640-650, 657). *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). The Court thus held in *Owen* that, for purposes of amenability to suit, municipalities should be treated *identically* to private entities. *See* 445 U.S. at 639, 640. That holding plainly falls far short of a conclusion that governments have *special* obligations to pay refunds or offer other forms of retroactive remedies in circumstances where private parties would not be liable for that relief.[9]

In fact, in a setting that is analogous to the one here—where the issue involved remedy rather than amenability to suit—the Court made it clear that the status of the defendant as a governmental entity provides special fac-

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[9] It is worth noting that a Section 1983 action for a refund is very likely unavailable in these cases. Money damages may not be awarded against States in Section 1983 actions in federal court. *See Quern v. Jordan*, 440 U.S. 332 (1979). The Court recently heard arguments on the question whether States are "persons" who may be sued under Section 1983 in their own courts, *Will v. Michigan State Police*, No. 87-1269 (argued Dec. 5, 1988); as we explain in our brief in that case, we believe that they are not. In any event, as we note below (at 22-23), there is serious doubt that violations of the Commerce Clause are cognizable under Section 1983.

tors cutting *against* the undoing of settled transactions as a remedy, at least where the constitutional standard governing liability was doubtful:

> Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fail. In our view, appellants' position could seriously undermine the initiative of state legislative and executive officials alike. Until judges say otherwise, state officers * * * have the power to carry forward the directives of the state legislature.

*Lemon II*, 411 U.S. at 207-208 (plurality opinion). The *Lemon* Court therefore refused to set aside transactions that the State had entered into with private parties in violation of the Establishment Clause. In the absence of compelling constitutional considerations mandating retroactivity (*see id.* at 201-203), the Court added that "[w]e do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law'" (*id.* at 208; quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973)); "absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Id.* at 208-209.

Other, related considerations reinforce the conclusion that governmental units pursuing the public's business should receive more solicitude in the formulation of remedies than private entities pursuing private ends. The ATA petitioners demonstrate a profound misunderstanding of the fiscal realities facing state and local governments when they cavalierly suggest that States found liable for refunds may suffer "at most inconvenience" (Br. 35) and that "the refunds can be financed by new tax



levies" (Br. 37). In a time of almost universal budget deficits and changing economies (*cf.* Academy for State and Local Gov't, *Where Will the Money Come From: Finding Reliable Revenue for State and Local Governments in a Changing Economy* (1986)), it is hardly a simple matter for a State or a local government suddenly to make unexpected outlays of hundreds of millions of dollars. Pointing to these considerations, Justice Powell, writing for five Justices in *Norris*, concluded that the imposition of retroactive monetary liability on a State was—*Owen* notwithstanding—inappropriate in an action under Title VII.

Noting that "the cost [of retroactive relief in *Norris*] would fall on the State of Arizona," and that "[p]resumably other state and local governments also would be affected directly" by the Court's decision, the Court explained: "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial financial deficits. Income, excise, and property taxes are being increased." Because the illegality of Arizona's conduct had not been settled until the decision in *Norris* itself, the Court saw "no justification * * * to impose this magnitude of burden retroactively on the public." 463 U.S. at 1106-1107. *See id.* at 1110 (O'Connor, J., concurring). *Cf. Long*, 108 S. Ct. at 2362-2363.[10]

These observations point up a central difference between liability imposed on public, as opposed to private,

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[10] Indeed, dissenting in *Scheiner*, Justice O'Connor noted the reliance interest that States have in expected sources of revenue; specifically pointing to the Arkansas tax at issue here, Justice O'Connor explained that Arkansas "opened its highways to the heaviest trucks only upon the understanding that it might collect sufficient revenue from those trucks by means of flat taxes to compensate for the damage they do to its roads. If this flat tax is also unconstitutional, then Arkansas is left with the damage but without the taxes." 107 S. Ct. at 2849 (O'Connor, J., dissenting). The disruption to the State's finances obviously will be compounded many-fold if invalidation of the tax is combined with retroactive liability.

defendants. When a private party acts to further its own ends in an area where the law is unsettled, there is no inequity in holding it fully liable if it is found to have violated the law; doing so will simply require it to bear the costs that it incurred in pursuit of its private purposes. When a State or a local government is held liable, in contrast, the ultimate burden falls not on a wrongdoer but on "the shoulders of blameless or unknowing taxpayers" (*Fact Concerts*, 453 U.S. at 267) in the form of higher taxes or—perhaps more likely, given strapped state treasuries—reduced benefits. *Cf. ibid.*; *id.* at 271. At least in the Commerce Clause context, it is no answer to this that "'it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated'" (ATA Br. 34, quoting *Owen*, 445 U.S. at 655). As we explain more fully below (at 21-23), the Commerce Clause does not create rights that are personal to the taxpayer; instead, it allocates power between the national and state governments. A Commerce Clause violation therefore does not deprive an injured party of something to which it was "entitled" in the same sense as does a due process violation of the sort at issue in *Owen*. The balance therefore tips in favor of the public and against the private interests.

***2. The availability of a refund is a question of remedy that should be settled by state courts as a matter of state law.***

a. The considerations outlined above suggest that *Chevron* should not govern in these cases. Rather than create a new rule of retroactivity or remedy, however, the Court can best reconcile the competing interests here by allowing the state courts to determine the availability of a refund according to state law. As a general matter, after all, questions of remedy that arise in state causes of action are resolved by state courts according to their



own rules. As this Court explained more than 50 years ago, in perhaps its most famous statement on the subject of retroactivity, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward"; "[t]he choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 365 (1932). *See Havemeyer v. Iowa County*, 70 U.S. (3 Wall.) 294, 303 (1865); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206 (1863). Of course, state courts are free to apply the *Chevron* standard (or something that looks like it) in settling upon appropriate remedies—and many do[11]—but their misapplication of *Chevron* in a lawsuit grounded on state law does not provide federal grounds for complaint.

Absent overriding federal constitutional considerations, the availability of a tax refund—which involves "essentially issues of remedy" (*Bacchus*, 468 U.S. at 276-277)—therefore should be settled by state law. And the simple fact that the injury giving rise to the remedy involved the federal Constitution does not make reference to state law inappropriate. After invalidating underinclusive state programs under the Equal Protection Clause, for example, the Court has left it to the state courts to determine, as a matter of state law, whether the pool of beneficiaries should be expanded or contracted. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

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[11] *See, e.g., Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983). Some States, however, have developed their own retroactivity tests. *See, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *app. dismissed*, 107 S. Ct. 1949 (1987).

*See also Williams v. Vermont*, 472 U.S. 14, 28 (1985). The Court has followed an identical course in leaving to the state courts the formulation of a remedy for a violation of the Supremacy Clause. *Exxon Corp.*, 462 U.S. at 196-197. Indeed, in the Commerce Clause area the Court already has at least implicitly acknowledged the relevance of state law in determining entitlement to a refund; the Court has declined to resolve refund claims coming from state courts, explaining that it would "not take upon itself in this complex area of state tax structures to determine how to apply its holding[s]." *Tyler Pipe Industries*, 107 S. Ct. at 2822. *See Bacchus*, 468 U.S. at 276-277. This course, we believe, is a sensible one. Leaving the development of remedies to the state courts may give States a flexibility that will benefit both out-of-state taxpayers and the public: States may, for example, use tax credits or other forms of relief in the place of more disruptive refunds.

Having said this, we recognize that there obviously are federal components to the questions here: one of these cases involves the effect to be given a decision of this Court rather than, as in *Sunburst*, of the highest court of a State; in both cases the controversy that led to the remedy question involved the meaning of the federal Constitution, although petitioners proceeded under state refund statutes. It therefore might be appropriate for this Court to mandate the use of particular (or nationally uniform) remedies if doing so were necessary to effectuate the Commerce Clause.[12] *Cf. Chapman v.*

[12] Unless it is necessary to effectuate the Commerce Clause—and as we explain in text, it is not—there are no federal policies here militating in favor of the creation of a nationally uniform refund remedy. *Compare West Virginia v. United States*, 107 S. Ct. 702, 705-707 (1987); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). To the contrary, the area of taxation is one in which the State's interest in using its own rules is especially compelling. *See, e.g., Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). *See generally United States v. Yazell*, 382 U.S. 341 (1966).



*California*, 386 U.S. 18, 21 (1967). Absent the existence of a special federal interest that would be furthered by particular remedies, however, the choice of remedy should be left to state law. And as we explain below, there is no such federal interest in these cases.

b. Petitioners assert (ATA Br. 28-33; McKesson Br. 37-40) that a federal rule mandating retrospective relief is necessary to deter state legislatures from enacting, and state executives from enforcing, tax schemes that are inconsistent with the Commerce Clause. But this argument proves too much. It leads to the conclusion that retrospective relief should be awarded by this Court whenever governmental entities are found to have acted in violation of the Constitution or federal law, except perhaps in cases where the invalidity of the governmental action could not possibly have been anticipated. As noted above, however, the Court has rejected such an approach. Indeed, in other contexts the Court has found that the specter of retrospective liability is not necessary "to ensure compliance with [its] decisions." *Long*, 108 S. Ct. at 2362. *See Norris*, 463 U.S. at 1106-1107 (opinion of Powell, J.,); *id.* at 1110 (O'Connor, J., concurring). Moreover, given the highly disruptive effects of retrospective liability, petitioners' approach threatens to overdeter by "undermin[ing] the initiative of state legislators and executive officials alike." *Lemon II*, 411 U.S. at 207-208 (plurality opinion).

More fundamentally, petitioners themselves distort the Constitution when they suggest (ATA Br. 29-30 & n.20) that the Court should create special constitutional remedies because state courts cannot be trusted to adjudicate evenhandedly claims grounded on constitutional violations. Noting that "Art. VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties," this Court repeatedly has refused "to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*,

420 U.S. 592, 611 (1975). *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987); *Moore v. Sims*, 442 U.S. 415, 430 (1979).

In fact, the performance of state courts would not support such an assumption. Those courts have, with regularity, invalidated state statutes that are inconsistent with the Commerce Clause; indeed, the Supreme Court of Florida did just that in *McKesson*. *See also, e.g., Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984). State courts also have awarded refunds to taxpayers in appropriate cases where tax statutes were invalidated under the Commerce Clause or other provisions of federal law.[13] As decisions cited by the ATA petitioners indicate (Br. 31-32 n.22), state courts have similarly been willing to provide retroactive relief when legislatures attempted to evade the Commerce Clause by enacting successive, unconstitutional levies. And when state courts have declined to make refunds available after finding tax statutes inconsistent with the Commerce Clause or other provisions of federal law, they generally have accompanied their holdings with carefully considered analyses of the factors discussed above: reliance by state authorities on the presumptive constitutionality of legislation, in combination with a well-founded fear that retroactive relief would have devastating fiscal consequences

[13] *See, e.g., Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) (previously collected taxes escrowed and then refunded in Commerce Clause case); *Burlington Northern R.R. Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988) (refund where state tax preempted by federal law); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978) (tax invalidated as inconsistent with federal law; refund available if taxpayers complied with state refund procedures); *Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984) (Commerce Clause violation; court remanded for recomputation of tax). *See also Midland Bank & Trust Co. v. Olsen*, 717 S.W.2d 580 (Tenn. 1986) (refund available from time of decision establishing illegality of tax).



for the public.[14] The record thus demonstrates no need for intervention by this Court.

c. Petitioners also assert (ATA Br. 27-28; McKesson Br. 37-38) that refunds would provide the relief necessary to make them whole for the States' violations of the Commerce Clause. As we suggested above, however, this assertion misunderstands the nature of the interests protected by the Clause.

The Commerce Clause does not absolutely entitle taxpayers to a right to trade freely between the States. It does not, after all, "limit the authority of *Congress* to regulate commerce among the several States as it sees fit," or detract from Congress's authority to " 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.' " *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652 (1981) (emphasis in original) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)). *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Thus, nothing in the Clause gives individuals a right to engage in commerce; instead, it allocates the authority to regulate commerce "between the national and state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), implementing "the great constitutional purpose of the fathers" to grant Congress rather than the States "the power 'To regulate Commerce with foreign Nations, and among the several States . . .' " *Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946). The Court's decisions in the Commerce Clause area are

[14] *See, e.g., Salorio v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983); *Metropolitan Life Insurance Co. v. Commissioner*, 373 N.W.2d 399 (N.D. 1985); *First of McAlester v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985); *Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *app. dismissed*, 107 S. Ct. 1949 (1987).

accordingly "replete with references to the *national* or *federal interests* in preventing the burdensome state regulation of interstate commerce." *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) (emphasis in original) (citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959); *H.P. Hood & Sons, Inc., v. DuMond*, 336 U.S. 525, 537-542 (1949); *Southern Pacific*, 325 U.S. at 775-776).

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit is incidental. Unlike the Bill of Rights and the personal guarantees of the Civil War Amendments, the Commerce Clause was designed to serve national rather than individual ends by forestalling the "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *Hood & Sons*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, Secs. 259-260). *See* 336 U.S. at 534, 537.[15] Thus, despite occasional references in this Court's opinions "to a right to engage in interstate commerce, * * * the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways*, 730 F.2d at 1145.[16] *See id.* at 1144. It is for this reason that,

[15] "It is true that the litigation is between private parties, but the issues touch the relative jurisdiction of nation and state." Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 22-23 (1940).

[16] As Professor Choper has noted, "when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. * * * [W]hen a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one." J. Choper, *Judicial Review in the National Political Process* 174-175 (1980).



as Justice White has noted, the "weight of authority" recognizes that a Commerce Clause violation is not cognizable under 42 U.S.C. § 1983. *Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from the denial of certiorari). *See, e.g., Consolidated Freightways*, 730 F.2d at 1144-1146; *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-849 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987) (no Section 1983 cause of action to challenge violation of another power-allocating provision of the Constitution, the Supremacy Clause). *See also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-615 (1979) (violation of the Supremacy Clause does not infringe rights "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3)); *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd*, 305 U.S. 576 (1939) (predecessor to 28 U.S.C. § 1343(3) did not provide jurisdiction for a dormant Commerce Clause claim). *See generally White Mountain Apache Tribe*, 810 F.2d at 849-850.

Against this background, petitioners err when they suggest that they somehow are entitled to redress for the burden placed upon them by virtue of the States' violations of the Commerce Clause. The Clause safeguards the national interest in the free flow of commerce; the Arkansas Supreme Court was thus correct in holding (ATA Pet. App. 4a) that the principal purpose of the Clause is vindicated when state barriers to commerce are dissolved. *See Nat'l Can Corp. v. Washington Dept. of Revenue*, 109 Wash. 878, 749 P.2d 1286, *app. dismissed and cert. denied*, 108 S. Ct. 2030 (1988). Because the Clause does not secure any personal right of petitioners, it is largely a matter of indifference to the Constitution whether a refund remedy is available as well.

d. In any event, even if the analysis above is incorrect —that is, even if the Commerce Clause creates a right that is in some sense personal to the out-of-state taxpayer —the Clause plainly does not entitle the taxpayer to any particular level of tax. At best, out-of-state taxpayers like petitioners have a right to nondiscrimination in the form of treatment equal to that accorded in-state taxpayers. As the Court has noted time and time again, it is discrimination between residents and non-residents that is the hallmark of a Commerce Clause violation. *See, e.g., Scheiner*, 107 S. Ct. at 2839; *Tyler Pipe Industries*, 107 S. Ct. at 2828-2829; *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Lewis*, 447 U.S. at 36-37; *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287-288 (1977); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977); *Nippert*, 327 U.S. at 425; *McGoldrisk v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 35, 49 (1940).

Any personal rights that exist under the Commerce Clause are therefore closely analogous to those created by the Equal Protection Clause (or the equal protection component of the Fifth Amendment's Due Process Clause). As in the Commerce Clause setting, "the right to equal treatment guaranteed by the Constitution['s Equal Protection Clause] is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). This means that the remedy for a program found to be discriminatory under the Equal Protection Clause is "a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by expansion of benefits to the excluded class." *Id.* at 740 (emphasis in original). *See Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (opinion of Powell, J.). So far as we are aware, however, the Court has never suggested that either the federal or the state and local governments are obligated to remedy



equal protection violations by extending that mandate of equal treatment into the past. Such a doctrine would have incongruous results: it would mean, for example, that a State that improperly accorded special benefits to a small category of persons would either have to reclaim those benefits or make them retroactively available to everyone else in the population.

In our view, the Constitution does not require such an outcome. Indeed, the *Mathews* Court, far from requiring a retroactive equalization of benefits, permitted Congress to make continued use of an improper classification into the *future* to protect the reliance interests of the previously favored class. *See* 465 U.S. at 745-751. Similarly, as we note above, the Court has left it to state courts to determine, according to state law, how to remedy the defects in state programs that are found to violate the Equal Protection Clause. *See Hooper*, 472 U.S. at 624; *Zobel*, 457 U.S. at 64-65. *See also Exxon Corp.*, 462 U.S. at 196-197.[17] *Cf. Williams*, 472 U.S. at 28. The same reasoning compels the conclusion that a Commerce Clause violation is fully remedied when the State terminates the improper discrimination. Questions about the availability of any additional remedy should be left to the state courts to resolve under state law.

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[17] In these Equal Protection and Supremacy Clause cases the Court reasoned that the remedy question involved severance, leaving it to the state courts to determine whether benefit programs would have been enacted in the absence of the unconstitutional limitation. The holdings of the Florida courts below demonstrate the relevance of the equal protection analysis to the Commerce Clause: the Florida courts in effect severed the unconstitutional exemption, leaving the larger tax program in effect. See *McKesson* Pet. App. 27a.

## CONCLUSION

The judgments of the Supreme Courts of Arkansas and Florida should be affirmed.

Respectfully submitted,

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